U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 29 2004

EAC 99 015 52065

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
for Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, whose decision was affirmed by the Administrative Appeals Office (AAO), on appeal. The matter is now before the AAO on counsel's motion to reopen. The motion will be dismissed.

The petitioner is a Middle Eastern restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on July 10, 1995, and approved by the Department of Labor (DOL), on January 15, 1997. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The AAO upheld the director's decision and the petitioner's counsel subsequently filed a motion to reopen.

In support of the motion to reopen, the petitioner's counsel submitted a brief statement and a copy of a Form 1040X Amended U.S. Individual Tax Return for the 1995 tax year.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the DOL employment system. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on July 10, 1995. The proffered wage as stated on the Form ETA 750 is $300.00 per week, or $15,600 per year.

The petitioner's counsel has submitted two separate petitions on behalf of the beneficiary. The first petition, filed on March 13, 1997, was denied by the director on August 4, 1997, for failure to establish the ability to pay the proffered wage. The principal evidence accompanying that petition was a copy of the petitioner's 1995 and 1996 Profit or Loss forms. The director found that for 1995 the forms showed a net profit of only

$5,818, an amount below the proffered wage. Counsel appealed the director's decision to the AAO, and on April 30, 1998, the AAO dismissed the appeal noting the low net profits for 1995.[1]

Counsel subsequently filed a new Form I-140 on October 30, 1998. CIS sent a Request for Evidence (RFE), asking for clarification of the preference category, and requesting a copy of the petitioner's complete 1995 income tax return and a list of the petitioner's monthly expenses.[2] Counsel responded to the RFE on May 4, 1999, noting that "substantial amendments have been made to the Petitioner's 1995 Individual Income Tax Returns." The explanation, offered in counsel's letter, was that a bookkeeping error had been discovered for the 1995 tax year in which the "'numbers of cost of goods sold and gross profit were mistakenly interposed.'" (Response to the RFE at pp.1-2, referencing the 1995 Amended Tax Return.) Counsel offered a list of the petitioner's expenses, and noted that the 1996 tax returns had likewise been amended and previously submitted. (Response to the RFE at p.2.) Finally, counsel argued that given that the beneficiary's wages constituted minimal amounts of the company's revenues for 1995 and 1996, the petitioner should be found to have the ability to pay the proffered wage.

The director denied the petition on June 25, 1999, finding that the record did not establish that the petitioner had the ability to pay the proffered wage. It appears that an error was made in comparing the amended tax returns with the figures from the original tax returns. The director's decision considered the same figures previously reflected on the un-amended returns; for 1995, net profits of $5,818, instead of net profits of $42,554 represented by the amended tax return. (*See* Director's Decision at p.1.) The director's decision also noted that although the RFE had asked for the complete copy of the tax returns, only a partial copy was submitted.[3]

Counsel appealed the director's decision to the AAO on July 26, 1999. A letter from counsel, and a complete copy of the petitioner's 1995 tax return accompanied the appeal. The letter from counsel asserted that the director had incorrectly interpreted the amendments to the 1995 Schedule C, and explained that the amended filing actually demonstrated that the net profits were $42,554. The AAO issued its decision on November 26, 1999, finding that the petitioner's 1995 federal tax return showed an adjusted income of $39,547, an amount which, when reduced by the petitioner's monthly expenses and the beneficiary's salary, still left $24,342. The AAO concluded that the 1995 amended tax support the petitioner's ability to pay the proffered wage, but went on to find that "there is no evidence in the record which verifies that the Form 1040X was actually filed with the Internal Revenue Service. Absent verification that the Form 1040X was filed with the Internal Revenue Service as an amended return, it has simply been altered rather than amended." (AAO decision at p.4.)

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[1] The petitioner's counsel had unsuccessfully argued that the restaurant's accountant had verified that the restaurant generated sufficient income to pay the proffered wage. In addition, counsel asserted that the beneficiary had worked for the petitioner during 1996 and had been paid more than the prevailing wage even though the payments were not formally recorded.

[2] The AAO notes that the RFE indicated that only the 1995 tax return would be used "as the 1996 and 1997 returns do not cover the date of filing." (*See* RFE at p.2.) This was in error. While the 1995 priority date required that evidence of ability to pay the wage for 1995 be shown, the 1996 and 1997 records were also important, as the ability to pay the wage must be demonstrated through the approval of the petition.

[3] Counsel disputes the fact that the complete tax records were not previously submitted. Although our review of the record has not disclosed a previous submission of the complete return, it is now contained in the record.

Counsel has submitted a motion to reopen the AAO's decision. In counsel's brief statement in support of the motion, he explains the circumstances surrounding the efforts to file the amended tax return with the Internal Revenue Service (IRS).

> On December 16, 1999 petitioner requested that the IRS provide verification of filing. However, the IRS reported that a computer printout was not available without a "buck-slip" from the Immigration and Naturalization Service. However, the IRS indicated that they would place a filing stamp on the amended tax returns.
>
> Accordingly, enclosed please find a copy of the amended 1995 taxes in this matter with a December 16, 1999 fling stamp from the IRS office at 290 Broadway, New York, NY.

See Motion to Reopen, dated December 16, 1999.

We are not persuaded by counsel's argument and the motion fails, as it does not satisfy the regulatory requirements which provide:

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

8 C.F.R. § 103.5(a)(2)

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) *INS v. Abudu*, 485 U.S. 94, 100 (1988). In federal criminal proceedings, a motion for a new trial based on newly discovered evidence "may not be granted unless...the facts discovered are of such nature that they will probably change the result if a new trial is granted,...they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and...they are not merely cumulative or impeaching." *Matter of Coelho*, 20 I&N Dec. 464, 472 n.4 (BIA 1992) (quoting *Taylor v. Illinois*, 484 U.S. 400, 414 n.18 (1988)).

A review of the evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). The evidence submitted was previously available and could have been discovered or presented in the previous proceeding. Counsel's own submission indicates that it was not until December 16, 1999, the same date as the filing of the motion, that a verification of filing the amended tax returns was sought. The implication in counsel's statement in support of the motion is that the amended tax returns had already been filed, and that all that was sought was a verification of the filing previously made. Counsel's contention that

the IRS would not providing verification of filing without a "buck slip" from the Immigration and Naturalization Service (now CIS), is not supported by any evidence, such as a written policy issued by the IRS verifying such a policy. Without objective evidence, counsel's assertions are merely that, and do not constitute evidence to be considered. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, the stamped tax returns submitted by counsel are not satisfactory evidence to demonstrate that the AAO should reopen its decision. The stamp does not indicate that the amended tax return had *previously* been filed by the petitioner. At best, it indicates that the petitioner may have filed an amended tax return for the 1995 tax year on December 16, 1999. The filing of an amended tax return subsequent to the AAO's decision has no bearing on the propriety of that decision.

Beyond the director's decision, we note that even if counsel's submission of the date stamped amended tax return were somehow considered probative on the issue of whether the tax return had been previously filed, the record still would be devoid of required evidence. First, although counsel has related his efforts to obtain evidence of the filing of the 1995 tax return, no evidence exists as to the filing of the amended tax return for 1996. Counsel's statement only mentions the 1995 return, and documents submitted only reflect a date stamped return for 1995. Second, aside from evidence supporting the petitioner's ability to pay the proffered wage during 1995 and 1996, the record should contain information about the petitioner's ability to pay the proffered wage beyond that date up through the approval of the petition. Although the matter has been pending for an extended period, no evidence demonstrating the petitioner's ability to pay the proffered wage was offered for any tax year beyond 1996, even though the latest I-140 petition was filed in October of 1998.

For these reasons, the motion may not be granted. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *Doherty*, 502 U.S. at 323 (citing *Abudu*, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." *Abudu*, 485 U.S. at 110.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen is dismissed.